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by

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Addendum

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SECTION 6

DRAFT ARTICLES AND ANNEX

96. The Special Rapporteur proposes the following draft articles and Annex.

PART THREE

Article 1

Conciliation

If a dispute which has arisen following the adoption by the allegedly injured State of any countermeasures against the allegedly law-breaking State has not been settled by one of the means referred to in article 12 (1) (a) or has not been submitted to a binding third party settlement procedure within [four] [six] months from the date when the measures have been put into effect, either party [to the dispute] is entitled to submit it to a Conciliation Commission in conformity with the procedure indicated in the Annex to the present articles.

Article 2

Task of the Conciliation Commission

1. In performing the task of bringing the parties to an agreed settlement, the Conciliation Commission shall:

(a) examine any question of fact or law which may be relevant for the settlement of the dispute under any Part of the present articles;

(b) order, with binding effect:

(i) the cessation of any measures taken by either party against the other;

(ii) any provisional measures of protection it decides necessary;

(c) resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.

2. Failing conciliation of the dispute, the Commission shall submit to the parties a report containing its evaluation of the dispute and its settlement recommendations.

Article 3

Arbitration

Failing the establishment of the Conciliation Commission provided for in article 1 or failing an agreed settlement within six months following the report of the Conciliation Commission, either party is entitled to submit the dispute for decision, without special agreement, to an Arbitral Tribunal to be constituted in conformity with the provisions of the Annex to the present articles.

Article 4

Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal shall operate under the rules laid down or referred to in the Annex to the present articles and shall submit its decision to the parties within [six] [ten] [twelve] months from the date of [completion of the parties' written and oral pleadings and submissions] [its appointment].

2. The Arbitral Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.

Article 5

Judicial settlement

The dispute may be submitted to the International Court of Justice for decision:

(a) by either party:

(i) in case of failure for whatever reason to set up the Arbitral Tribunal provided for in article 4, if the dispute is not settled by negotiation within six months of such failure;

(ii) in case of failure of the said Arbitral Tribunal to issue an award within the time-limit set forth in article 4;

(b) by the party against which any measures have been taken in violation of an arbitral decision.

Article 6

Excès de pouvoir or violation of fundamental principles of arbitral procedure

Either party is entitled to submit to the International Court of Justice any decision of the Arbitral Tribunal tainted with excès de pouvoir or departing from fundamental principles of arbitral procedure.

Annex

Article 1 1/

Composition of the Conciliation Commission

Unless the parties concerned agree otherwise, the Conciliation Commission shall be constituted as follows:

1/ The provisions of the draft annex proposed by Professor Riphagen corresponding to articles 1 and 2 above read as follows:

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 4 (c) of Part 3 of the present articles, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties to the dispute shall be appointed within 60 days following the date on which the Secretary-General receives the request.

The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within 60 days following the expiry of that period. The appointment of the chairman may be made by the

The Commission shall be composed of five members. The parties shall each nominate one commissioner, who may be chosen from among their respective nationals. The three other commissioners shall be appointed by agreement from among the nationals of third States. These three commissioners must be of different nationalities and must not be habitually resident in the territory nor be in the service of the parties. The parties shall appoint the President of the Commission from among them.

Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the disputes.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to submit to conciliation shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Conciliation Commission acting under this annex has competence shall be decided by the Commission

5. The Conciliation Commission shall decide its own procedure. The Commission with the consent of the parties to the dispute, may invite any State to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

6. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

7. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

8. The Commission shall report within 12 months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions started therein regarding the facts or questions of law, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

9. The fees and expenses of the Commission shall be borne by the parties to the dispute.

If the appointment of the commissioners to be designated jointly is not made within the period for making the necessary appointments, the appointment shall be entrusted to a third State chosen by agreement between the parties, or on request of the parties, to the President of the General Assembly of the United Nations, or, if the latter is not in session, to the last President.

If no agreement is reached on either of these procedures, each party shall designate a different State, and the appointment shall be made in concert by the States thus chosen.

If, within a period of three months, the two States have been unable to reach an agreement, each of them shall submit a number of candidates equal to the number of members to be appointed. It shall then be decided by lot which of the candidates thus designated shall be appointed.

In the absence of agreement to the contrary between the parties, the Conciliation Commission shall meet at the seat of the United Nations or at some other place selected by its President.

The Commission may in all circumstances request the Secretary-General of the United Nations to afford it his assistance.

The work of the Conciliation Commission shall not be conducted in public unless a decision to that effect is taken by the Commission with the consent of the parties.

In the absence of agreement to the contrary between the parties, the Conciliation Commission shall lay down its own procedure, which in any case must provide for both parties being heard. In regard to enquiries, the Commission, unless it decides unanimously to the contrary, shall act in accordance with the provisions of Part III of the Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907.

In the absence of agreement to the contrary between the parties, the decisions of the Conciliation Commission shall be taken by a majority vote, and the Commission may only take decisions on the substance of the dispute if all members are present.

Article 2

Task of the Conciliation Commission

1. The tasks of the Conciliation Commission shall be to elucidate the question in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.

2. At the close of the proceedings, the Commission shall draw up a procès-verbal stating, as the case may be, either that the parties have come to an agreement and, if need arises, the terms of the agreement, or that it

has been impossible to effect a settlement. No mention shall be made in the procès-verbal of whether the Commission's decisions were taken unanimously or by a majority vote.

3. The proceedings of the Commission must, unless the parties otherwise agree, be terminated within six months from the date on which the Commission shall have been given cognizance of the dispute.

4. The Commission's procès-verbal shall be communicated without delay to the parties. The parties shall decide whether it shall be published.

Article 3

Composition of the Arbitral Tribunal

1. The Arbitral Tribunal shall consist of five members. The parties shall each nominate one member, who may be chosen from among their respective nationals. The two other arbitrators and the Chairman shall be chosen by common agreement from among the nationals of third States. They must be of different nationalities and must not be habitually resident in the territory nor in the service of the parties.

2. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, a third State, chosen by agreement between the parties, shall be requested to make the necessary appointments.

3. If no agreement is reached on this point, each party shall designate a different State, and the appointments shall be made in concert by the States thus chosen.

4. If, within a period of three months, the two States so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the International Court of Justice. If the latter is prevented from acting or is a national of one of the parties, the nominations shall be made by the Vice-President. If the latter is prevented from acting or is a national of one of the parties, the appointments shall be made national by the oldest member of the Court who is not a national of either party.

5. Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

6. The parties shall draw up a special agreement determining the subject of the disputes and the details of procedure.

7. In the absence of sufficient particulars in the special agreement regarding the matters referred to in the preceding article, the provisions of the Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907 shall apply so far as is necessary.

8. Failing the conclusion of a special agreement within a period of three months from the date on which the Tribunal was constituted, the dispute may be brought before the Tribunal by an application by either party.

9. If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply, subject to the present articles, the rules in regard to the substance of the dispute enumerated in article 38 of the Statute of the International Court of Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide ex aequo et bono.

97. The contents of the articles and the Annex are explained in Section 4 of this report (see document A/CN.4/453).

98. Further articles may have to be added to complete Part Three of the draft on State responsibility in order to deal with the procedures that might be contemplated with respect to the instrumental (procedural) consequences of the kinds of internationally wrongful act qualified as "crimes" under article 19 of Part One as adopted on first reading.